No. 77-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

HAWAIIAN TELEPHONE COMPANY

and

HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,
Joint Petitioners,

v.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ET AL.,
Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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I. The Issue Presented By the Petition Has Already Been Decided By This Court Against Petitioners' Position.

The issue which petitioners urge this Court to review is whether Hawaii's grant of unemployment compensation benefits to strikers under certain circumstances is contrary to the policies of the National Labor Relations Act and on that ground contravenes the Supremacy Clause. That issue has already been decided against petitioners' position in *Kimbell* v. *Employment Security Commission of New Mexico*, 429 U.S. 804, a case in which this Court, on an appeal from the Supreme Court of New Mexico, dismissed as insubstantial the question:

> "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the

> Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?" [1]

The Court acted in *Kimbell* only after inviting the views of the United States. In response, the Government declared:

> "The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act * * * and the Social Security Act. * * * The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each State." [2]

The United States therefore urged that "the appeal should be dismissed for want of a substantial federal question".[3] This Court agreed.[4]

Petitioners assert that the "instant case differs significantly from *Kimbell* * * *".[5] None of the distinctions which they proffer has the slightest merit, as we now show.

First, petitioners assert that in *Kimbell*, "the record did not disclose whether the employers were subject to the NLRA". (Pet. 15, n.12.) It is clear from the papers

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[1] Jurisdictional Statement, No. 75-1452, p. 4.

[2] Memorandum for the United States, No. 75-1452, p. 5, (hereafter, "U.S. Mem.").

[3] *Id.*, p. 11. The appellants and the Chamber of Commerce filed briefs in response to the Government's Memorandum.

[4] The Court's Order reads in its entirety as follows: "75-1452 Kimbell, Inc. v. Employment Security Comm. of New Mexico. The motion of Chamber of Commerce of the United States for leave to file a brief, as amicus curiae, is granted. The appeal is dismissed for want of a substantial federal question. Mr. Justice Brennan, Mr. Justice Blackmun and Mr. Justice Stevens would note probable jurisdiction and set the case for oral argument." (429 U.S. 804.)

[5] Petition for certiorari (hereafter "Pet."), p. 15, n.12.

filed in this Court and from the decision of the New Mexico courts that everyone including the Chamber of Commerce, as *amicus curiae*, assumed that the employers were so subject. In fact, the cover of the Jurisdictional Statement showed that one of the employer parties involved in that case was Safeway Stores, Inc. This alone was certainly sufficient indication that an employer subject to federal labor policy was affected, so that there was no reason to doubt a predicate that was not questioned. Indeed, if the *Kimbell* appellants had failed adequately to demonstrate that federal law was applicable, this Court's disposition would have been to dismiss the appeal "for want of a properly presented federal question". Compare *National Gypsum Co.* v. *Louisiana Dept. of Employment Security*, 313 S. 2d 527 (La. Sup. Ct.), *appeal dismissed for want of a properly presented federal question*, 423 U.S. 1009, where the question presented was basically the *same* as that in *Kimbell* and here, but the federal issue had not been timely raised and this Court therefore did not, as evidenced by the different language used in the dismissal order, reach the merits.

Second, petitioners say that "[i]t appears the claimants [in *Kimbell*] were locked out". (Pet. 15, n.12.) This attempted distinction is inconsistent with the proposition petitioners assert—that the NLRA is controlling. For that law does not differentiate between the employer's right to achieve his bargaining objectives by continuing operations during a strike and achieving those objectives by locking out the employees after impasse. (See *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300.)[6]

Third, it is said, "Unlike Hawaii, New Maxico had no fixed policy in advance of the strike." (Pet. 15, n.12.)

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[6] Compare the heading of Part II of the brief for the Chamber of Commerce as Respondent-Intervenor in *Batterton* v. *Francis*, No. 75-1181, p. 29: "Maryland's disqualification provisions properly deny AFDC-UF benefits to striking employees, but improperly confer these benefits upon locked out employees".

On the contrary, New Mexico's "policy" was fixed in its unemployment compensation statute, which is identical in this respect to that of Hawaii [7] (as well as many other States),[8] and which has been interpreted in the same manner by the Supreme Courts of both States [9] in accord with "the overwhelming majority of appellate decisions in the United States." [10]

Fourth, petitioners say: "Contrary to the facts in *Hawaiian Telephone*, it appears that strikers-claimants in New Mexico must be available for work and must register for work." (Pet. 15, n.12). Petitioners do not explain why, if this were so (and it is not so [11]), it would provide a basis for distinguishing between the New Mexico and Hawaii schemes so as to render *Kimbell* inapplicable here. And there is no such viable distinction. For it is clear that in *Kimbell* payments were made to *some* strikers, and that fact makes it plain that in making this

[7] The New Mexico statute provides that an applicant for unemployment compensation shall be disqualified from benefits "[f]or any week with respect to which * * * his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed * * *." New Mexico Unemployment Compensation Law of 1936, § 59-9-5(d), N.M. Stat. Ann. (Supp. 1975). Compare Hawaii Revised Statutes, § 383-30(4) set forth at Pet. pp. 4-5.

[8] See Pet. 17.

[9] Compare *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Comm'n*, 88 N.M. 596, 554 P.2d 1161 with *Meadow Gold Dairies* v. *Wiig*, 50 Haw. 225, 437 P.2d 317.

[10] Pet. 45a quoting Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U.Chi.L.Rev. 294, 308 (1950).

[11] The trial court in this case did not find, and the record does not show, that strikers-claimants are relieved of the "availability" requirement of § 383-29(3), Hawaii Rev. Stat., which provides that a claimant must be "able to work" and "available for work". Hawaii does not, to be sure, require strikers to register for work with the employment service; that is because registration for work is waived for all benefit claimants still attached to an employer. (Tr. Dec. 13, 1974, pp. 700-701.)

point petitioners are again unfaithful to their thesis that any payment of unemployment benefits to strikers is contrary to the NLRA.

Fifth, petitioners say: "Moreover, the only issue there presented was the narrow question of post-strike payments. The impact of benefit availability was never litigated therein. See *Kimbell* Jurisdictional Statement, pp. 8-9." (Pet. 15, n.12.) However, in *Kimbell* the Chamber of Commerce said that "four lawsuits [including *Hawaii Telephone* and *New York Telephone* [12]] now pending before the federal courts present the same generic issue involved in this appeal". It also observed that in all the pending cases, there already was or would be "a full record documenting and measuring the impact on collective bargaining * * * of the unemployment insurance subsidy to strikers * * *".[13] Accordingly, the Chamber concluded that if *Kimbell* is not summarily reversed, this Court "should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented".[14] The way to preserve the generic labor preemption question for consideration by those courts was, the Chamber insisted, for this Court to qualify its dismissal in *Kimbell* as it had done in *National Gypsum* p. 3, *supra*, with the words "for want of a properly presented federal question" or by noting that "the constitutional issue comes to the Court in highly abstract form".[15]

This Court, of course, chose instead to treat with the question presented on the merits and to dismiss "for want of a substantial federal question".

[12] Brief for the Chamber of Commerce as *amicus curiae*, No. 75-1452, p. 2.

[13] *Id.*, p. 3.

[14] *Id.*, p. 25.

[15] *Id.*, pp. 25-26.

Lastly, petitioners assert "Indeed, the federal preemption issue was mentioned only briefly—and then only in a footnote in another case which the New Mexico Supreme Court cited as the sole basis for its decision where it *distinguished* the case from *Hawaiian Telephone. Albuquerque-Phoenix Express, Inc.* v. *Employment Security Comm'n*, 88 N.M. 596, 554 P.2d 1161, 1165 n.1 (1975)." (Pet. 15-16, n.12, emphasis in original.) But, petitioners are quite wrong in saying that the New Mexico Court "distinguished" that case from *Hawaiian Telephone;* in the cited footnote, that Court expressly disagreed with the District Court's decision in this case:

> "We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., —— F.Supp. —— (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the 'stoppage' of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work."

Moreover, as the Court of Appeals for the Third Circuit said in rejecting a similar argument:

> "To the extent that appellants, in their second argument, are contending that the federal issue, though raised, was not *decided* by the state high court in *Kimbell* they ignore both the reference to *Albuquerque-Phoenix Express* and, more elementally, the basic jurisprudential fact that not to decide is to decide. * * * The federal question was raised and, if decided adversely to state law, it was con-

trolling. Under these circumstances, a state high court does not defeat federal review merely by issuing a tight-lipped decision in favor of the challenged state law. The New Mexico Supreme Court may not have *discussed* the federal issue in its summary disposition in *Kimbell* but for purposes of § 1257(2) it necessarily *decided* the issue, adversely to the claim that the state practice offended federal law when it reversed the lower court's decision upholding the notion that payment of state unemployment benefits interfered with the national labor policy. This would be so even if the reversal had not cited *Albuquerque-Phoenix Express.* Again, if the United States Supreme Court had concluded that there was no 'decision' in favor of the validity of the state law as required by § 1257(2), it would not have entertained jurisdiction in the case and would not have reached the merits as it did." [16]

II. No Court of Appeals Has Ever Decided The Issue Presented By The Petition In Favor of Petitioners' Position.

Petitioners state that they "are vitally concerned that the Second Circuit decision in *New York Tel* [*Co.* v. *New York State Dept. of Labor*, 556 F.2d 388, petition for certiorari pending, No. 77-961] be reviewed, and ultimately reversed by this Court" (Pet. 21.) This explains, if it does not justify, their extraordinary tactic of filing a petition for certiorari in this case before judgment in the Court of Appeals.[17] These two petitions for certiorari, the

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[16] *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903, 907-908 (C.A. 3) (footnote omitted; emphasis in original), *cert. denied*, 46 L.W. 3215 (Oct. 3, 1977), r'hg. den., 46 L.W. 3437 (Jan. 9, 1978).

[17] In *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963) and in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the petitions for certiorari arose out of the same administrative proceeding as a case which was before this Court in the normal course. And even petitioners would not contend, we suppose, that this case is of equal

simultaneously filed motion for leave to file a petition for rehearing out of time from the denial of certiorari in 1973 in *Grinnell Corp.* v. *Hackett*,[18] and a petition for rehearing from the denial of certiorari in *Super Tire*, *supra*, comprise a carefully orchestrated effort to create the impression that there is a live issue of public importance calling for this Court's resolution.[19] But while this flurry of papers is designed to obscure, it cannot con-

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significance with *Brown* v. *Board of Education*, 344 U.S. 1, the other case cited at Pet. 11, or with such cases as *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 and *U.S.* v. *Nixon*, 418 U.S. 683, in which certiorari was also granted before judgment in the Court of Appeals.

[18] 414 U.S. 858, denying certiorari to review 475 F.2d 449 (C.A. 1).

[19] We also note the Chamber of Commerce's efforts to have this Court decide the preemption issue in the context of two other cases in which this Court had granted review to decide entirely distinct issues. See the Chamber's briefs in *Ohio Bureau of Employment Security* v. *Hodory*, No. 75-1707, *passim* and in *Batterton* v. *Francis*, No. 75-1181, at pp. 21-32.

In *Hodory*, the Court said: "At no point in this litigation has appellee claimed that § 4141.29(D)(1)(a) conflicts with or is preempted by any provision of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* We do not today consider or decide the relationship between that Act and a statute such as § 4141.29(D)(1)(a)." (431 U.S. 471, 475, n.3.)

In *Francis*, the Chamber had filed a separate petition for certiorari, No. 75-1182, to review the ruling quoted at p. 10, *infra*. This Court initially deferred consideration of that petition, and ultimately denied it "[i]n light of" the decision in *Batterton*, 432 U.S. 416, 424, n. 7. While petitioners here rely on this footnote (Pet. 15, n.12), the petitioners in *Super Tire* stated more accurately: "In fact the Court in *Batterton* v. *Francis* dealt with one narrow, limited issue which does not affect the broader policy questions raised by the instant petition." (Petitioners' Reply To Brief In Opposition, No. 76-1684, p. 2).

The above-quoted refusals to decide issues which were not then before this Court contrast sharply with the disposition on the merits in *Kimbell*, where the "pre-emption issue" was squarely presented and fully briefed, see p. 2, nn.1-3, *supra*.

ceal, the fact that *no appellate court* has ever decided the issue presented in favor of petitioners' position.[20]

While *Super Tire* sought an extension of time to file its petition for rehearing from the denial of certiorari on the ground that *New York Telephone* was then *sub judice* in the Second Circuit and might give rise to a conflict, the only "conflict" to which *Super Tire* could point after that court ruled was between the view of the Third Circuit that *Kimbell* had already determined the preemption claim to be insubstantial and that of the Second Circuit that *Kimbell* did not dispose of the issue.[21] The *result* in

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[20] In attempting to breathe life into their preemption issue, petitioners in these cases have ensnared themselves in a web of contradictions. Two illustrations will suffice:

1) Although the Chamber of Commerce now attempts to differentiate its present attack on the Hawaii statute from its attack on the New Mexico statute in *Kimbell*, its brief in that case (p. 21) declared that the District Court's "conclusions [in *Hawaii Telephone*] are equally applicable to the virtually identical New Mexico law here involved." Its brief *amicus* in *New York Telephone* avoids the need for further self-contradiction by simply ignoring *Kimbell*.

2) Petitioners in *New York Telephone* assert that *Kimbell* "involved a different statute" (Pet. No. 77-961, p. 14, n.10). Yet they point to "a swelling volume of litigation in federal and state courts across the country challenging the validity of such payments on the very grounds here asserted" (*id.* p. 14), which includes several attacks on the Hawaii statute. That litigation could be resolved by a decision in *New York Telephone* only if the issue under the Hawaii statute is the same as that under the New York statute, which in turn is possible only if the New York and New Mexico statutes are likewise equated, for, as we have seen, the Hawaii and New Mexico statutes *are* identical.

[21] Petition for Rehearing, No. 76-1684, pp. 2-4.

Compare the letter of counsel to the Ninth Circuit in the instant case, responding to our reliance on the Third Circuit's decision in *Super Tire:*

> "First, the Chamber wishes to inform this Court that a timely petition for rehearing with suggestion for rehearing *en banc*, as authorized under Rule 40(a) and (b) Fed. R. App. P., was filed in the *SuperTire* case on March 11, 1977. At present the Third Circuit has made no disposition of this petition. If the petition is denied, *counsel for SuperTire, who is also counsel*

both cases was, of course, the same; *viz.*, a rejection of the plaintiffs' attack on public assistance to strikers, in *Super Tire* on the authority of *Kimbell*, and in *New York Telephone* on the basis of a comprehensive *de novo* analysis of the legislative materials.

Again, while petitioners in *New York Telephone* assert a conflict between the Second Circuit's decision and that of the First Circuit in *Grinnell*, which had, prior to *Kimbell*, directed a trial on the preemption issue, there is no reason to assume that on a full record the First Circuit would reach a different result than the Second Circuit.[22]

Additionally, in *Francis* v. *Batterton*[23] the Fourth Circuit determined, in passing on another federal-state cooperative program:

> "We reject the contention of the Chamber of Commerce that we should undertake to resolve what the Chamber considers to be an intolerable tension between Aid for Dependent Children (of parents involved in a labor dispute) and the National Labor Relations Act. We do not view the national labor policy and the national social policy as irreconcilable,

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for the Chamber of Commerce of the United States, will seek a stay of mandate pending petition to the Supreme Court for certiorari, as authorized under Rule 41(b) Fed. R. App. P. Thus, the Third Circuit's decision is still in litigation, and because it constitutes an improper application of the ruling in *Hicks* v. *Miranda*, 422 U.S. 332 (1975) is likely to be reconsidered."

(Letter from Gerald Smetana, Esq., to Emil Melfi, Jr., Clerk, United States Court of Appeals for the Ninth Circuit, dated March 28, 1977, p. 2, emphasis added).

[22] The plaintiff's motion for leave to file a petition for rehearing in *Grinnell*—whose thesis is that the First Circuit was wrong in directing a trial on the issue rather than deciding it in plaintiff's favor—betrays an understandably pessimistic evaluation of its prospects if that litigation is permitted to run its course.

[23] 529 F.2d 514 and 515 (C.A. 4), reversed on other grounds, 432 U.S. 416.

> but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide."[24]

In sum, every Court of Appeals that has finally decided the question, has held that the grant of public assistance to strikers by the States is consistent with the Supremacy Clause.

CONCLUSION

The question whether States may pay unemployment compensation benefits to strikers without violating federal law involves, as the United States argued in *Kimbell* and the Second Circuit held in *New York Telephone*, an inquiry into the intent of Congress.[25] That inquiry shows, *first*, that in enacting the basic unemployment compensation law in 1935, concurrently with the passage of the original National Labor Relations Act, Congress deliberately adopted the policy that the states are to be left free to decide whether and under what conditions strikers are eligible for unemployment benefits, and that this policy has never been abandoned (see U.S. Mem. pp. 5-6; 566 F.2d at 391-394); *second*, that in 1947, Congress, fully aware that from 1935 to that date the NLRA had not been understood to preempt state laws which permit the payment of unemployment compensation to strikers, consciously preserved that preexisting law (see U.S. Mem. pp. 6-7; 566 F.2d at 394); and *third*, that two existing analogous benefit programs over which Congress has retained plenary federal control affirmatively require that

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[24] See p. 103 of Petitioners' Joint Appendix in Nos. 75-1181 and 75-1182, where the Fourth Circuit's unreported opinion is reproduced.

[25] In determining whether an act of Congress preempts state law, "[t]he purpose of Congress is the ultimate touchstone". *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103.

strikers be eligible, a factor which reinforces the conclusion that in Congress' view there is no repugnance whatsoever between striker eligibility for benefits paid either on an insurance or a need basis and the system of collective bargaining mandated by the NLRA (see U.S. Mem. p. 7; 566 F.2d at 394-395).

The Petition for Certiorari is without merit and should be denied.

Respectfully submitted,

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